Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1979**

**No. 79-1477**

SEBASTIANA DiMAURO,

*Petitioner,*

*v.*

GEORGE M. PAVIA, EDGAR A. HARCOURT d/b/a PAVIA & HARCOURT, and BOSTON OLD COLONY INSURANCE COMPANY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case.

### PRELIMINARY NOTES

References herein to the Petition for a Writ of Certiorari (4) and the Appendix (2a) are to the page numbers from those documents.

Petitioner has omitted several words in the decision of the Court of Appeals, from the first numbered issue on appeal (2a) and from the fifth line of the second paragraph on page 3a. That decision therefore is printed correctly as an appendix to this brief.

## STATEMENT OF FACTS

The Statement of Facts filed by petitioner significantly distorts the record in this case, primarily through omission (see the facts as set forth by Judge Newman of the District Court, 4a-7a). Respondents here will point out only certain limited facts material to the questions presented by petitioner.

This case involves a sole beneficiary's suit against the administrator of an estate and the law firm in which he is a partner. Petitioner alleged negligence arising from the administrator's failure to sell stock, which was the principal asset of the estate. Petitioner states that she authorized sale of the stock and implies that retaining the stock was solely the choice of respondent Pavia (4-5). Substantial documentary evidence indicates, however, that respondents continually recommended selling and twice even made arrangements to sell the entire block of stock on favorable terms, but were dissuaded by petitioner's insistence that the stock be sold only on unrealistic terms (5a, 6a, 20a, 21a, 33a).

Petitioner paints herself as a simple, semi-literate Italian dressmaker (15). As the District Court noted, however, petitioner was conversant with sophisticated securities matters and fully capable of giving informed direction or consent regarding such matters (22a).

Petitioner represents that the decree of the New York Surrogate's Court, on October 3, 1975, which the District Court held barred this action, was rendered "without



notice or hearing to the petitioner" (7). In fact, however, petitioner first received notice of the final accounting proceeding in January 1974 and her lawyer was physically present in the Surrogate's Court on February 1, 1974. Thereafter, notice of those proceedings was given to petitioner and her counsel through letters in June, July and August 1975, and through an affidavit filed in the District Court by respondent Pavia in September 1975, just one week before the final decree in the Surrogate's Court.

## REASONS FOR DENYING THE WRIT

1. *No special or important reasons exist for granting the writ.*

Petitioner does not allege that this case has any importance beyond the fact situation and the litigants here involved. The case in fact does not have any such importance.

The Court of Appeals "carefully examined the record"and found petitioner's appeal so lacking in merit that it simply affirmed the judgment for the reasons stated in the opinion of the District Court. The District Court previously had searched the entire record and granted summary judgment for respondents on all fourteen counts of the complaint.

2. *Even if this Court were to find error in all of the questions presented, a judgment for respondents could be sustained on still other grounds.*

The judgment below for respondents rests on two independent grounds, estoppel by judgment and equitable estoppel. The trial court held that not only did the final decree of the New York Surrogate's Court bar petitioner's action, but that the "same principles of estoppel by judgment apply to the proceedings in the Connecticut Probate Court" (18a). No error was claimed in this holding, either

in the Court of Appeals or in the petition here. Thus, even if this Court were to find error in all of the questions presented by petitioner, the judgment for respondents still could be sustained on the basis of estoppel by the judgment of the Connecticut Probate Court.

3. *None of the questions presented by petitioner merits consideration by this Court.*

Petitioner has presented four questions for consideration. Respondents discuss them in the same order.

A. *Abstention has never been raised below and the District Court properly exercised its diversity jurisdiction.* Six years after she instituted this suit, petitioner raises an abstention claim for the first time in her petition to this Court. Abstention is a defendant's claim, and not properly a claim made by the plaintiff who initially filed the suit.

Petitioner did claim below that her case should have been remanded to the Connecticut state court of general jurisdiction. This claim was based on the erroneous view that, upon removal, the jurisdiction of a federal court in a diversity action is somehow smaller than the jurisdiction of the state court from which the case has been removed. If the District Court had no jurisdiction, then neither did the state court from which the District Court derived its authority. Petitioner's argument would lead to the conclusion that she filed suit *ab initio* in the wrong court and that her suit should have been dismissed rather than remanded.

The damage claims of petitioner in fact were in personam claims, cognizable by courts of general jurisdiction. Thus, as the District Court held, because federal jurisdiction was properly invoked for at least some of petitioner's claims, it was the duty of the District Court to determine the merits of the controversy (38a). See *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959).



B. *The* Granny Goose *question is not crucial to the judgment below and involves interpretation of state law.* The state court order issued at the beginning of this case was granted without notice and without hearing, as is a federal temporary restraining order under Rule 65(b). Although there is no "temporary restraining order" designated as such in Connecticut practice, the state court order, on removal, properly was treated as the equivalent of a Rule 65(b) order. The only ex parte orders under Rule 65 are temporary restraining orders. *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971). Thus, under this Court's ruling in *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423 (1974), the ex parte order expired shortly after removal. In any event, this question concerning interpretation of Connecticut law clearly lacks the significance required for review by certiorari.

Further, the record supports two other reasons for holding the ex parte order ineffective at the relevant time: (a) in accordance with its own terms, the order had been lifted by the "further order" of the District Court (June 12, 1975)(6) that respondents convey the bulk of the estate to petitioner, and (b) it was an invalid attempt by a Connecticut court to restrain proceedings in the New York Surrogate's Court. *Sullivan v. Title Guarantee & Trust Co.*, 167 F.2d 393 (2d Cir. 1948).

Finally, if petitioner really believed the ex parte order to be an effective bar to further action in the Surrogate's Court, she did not raise this point in the District Court when she and her counsel were given notice on several occasions of further action in the Surrogate's Court, as the result of the order of June 12, 1975 (6). In fact, in her Motion for Contempt of September 10, 1975 (6), petitioner specifically mentioned, without protest, further action by respondent Pavia in the Surrogate's Court. The final decree of the Surrogate's Court, finding notice to petitioner and no objection to the final acount, was issued on October 3, 1975 (7).

C. *The "absence of contacts" question is patently without merit.* The third question presented by petitioner argues that *Shaffer v. Heitner*, 433 U.S. 186 (1977), deprives probate proceedings of all finality as to a beneficiary outside the state and permits that beneficiary, after receiving due notice of such a proceeding, to ignore it and later sue the fiduciary in the forum of her choice. Probate decrees then would be effective against nonresidents only when they deigned to participate in the probate proceeding.

To state the argument plainly is to reveal its lack of merit. A holding for petitioner on this issue would overturn *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and throw the administration of estates into chaos.

D. *Verification of the translations was immaterial to the decision below.* Petitioner claims that summary judgment should not have been rendered on the basis of unverified translations. She has not alleged, however, that the translations submitted contained any material mistakes or differences. Petitioner thus could not have been harmed by any consideration given to the translations by the District Court.

Petitioner also claims a "genuine issue of material fact" was raised by her single blanket statement (made after this action was filed) that she did not "request or direct the defendants not to sell the estate's stock." Whether she requested or directed such action is immaterial, however, because her acquiescence in the retention of the stock was established by the complete absence of any protest by petitioner to the actions of respondents. The absence of protest continued from 1970 to 1974, despite the opportunity afforded by some 57 written communications between petitioner and respondents, many of which dealt with securities matters. Acquiescence by itself is sufficient for equitable estoppel. *Matter of Garvin*, 256 N.Y. 518 (1931); *Matter of Weston*, 91 N.Y. 502 (1883).



The overwhelming documentary evidence, all of which predated this litigation, was not controverted by petitioner. She filed a one-page conclusory affidavit in opposition to the summary judgment motion and extensive supporting documentation filed by respondents. She did not even file a statement of material facts, as required by local rule. An opposing party may not rest upon "mere denials or conclusory allegations, but must come forward with 'concrete particulars' to show that material issues of fact do exist" (2a). When the evidence justifies a directed verdict, as it clearly did in this case, summary judgment is appropriate. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

As counsel for respondents, I hereby certify that three copies of the foregoing brief were mailed on April 17, 1980, to Bruce L. Levin, Bai, Pollock & Dunnigan, Post Office Box 1978, 10 Middle Street, Bridgeport, Connecticut 06604, counsel for petitioner.

Bruce Louden

# APPENDIX

## UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December, one thousand nine hundred and seventy-nine.

Present: HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. LLOYD F. MacMAHON
United States District Judge
Sitting by Designation

SEBASTIANA DiMAURO,
*Plaintiff-Appellant,*

v.

GEORGE M. PAVIA, EDGAR A. HARCOURT d/b/a PAVIA & HARCOURT, and BOSTON OLD COLONY INSURANCE COMPANY,
*Defendants-Appellees.*

Dkt. No. 79-7350

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* substantially for the reasons set forth in Judge Newman's opinion of April 16, 1979.

Plaintiff Sebastiana DiMauro sued George M. Pavia and Edgar A. Harcourt d/b/a the law firm of Pavia & Harcourt. She charged defendants with negligence in administering and managing her late husband's estate. The district court granted defendants' motion for summary judgment. Plaintiff has appealed from that judgment.

The issues on appeal are:

(1) Do decrees of the Conencticut Probate Court and the New York Surrogate's Court, approving final accountings and discharging defendant administrator, foreclose plaintiff's claims concerning administration of her late husband's estate?

(2) Is plaintiff equitably estopped from asserting claims against defendants for actions she induced or agreed to?

(3) Did the district court err in denying plantiff's motion to remand this case to the Connecticut state court of general jurisdiction?

(4) Did certain of plaintiff's claims become moot subsequent to institution of this suit?

Our careful examination of the record, particularly in the light of the above issues on appeal, satisfies us that Judge Newman properly granted defendants' motion for summary judgment.



As we held in *SEC v. Research Automation Corp.*, 585 F.2d 31 (2 Cir. 1978), summary judgment is proper where (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. An opposing party cannot avoid summary judgment by mere denials or conclusory allegations, but must come forward with "concrete particulars" to show that material issues of fact do exist.

The major issues in this case are estoppel by judgment and equitable estoppel. Although we hold that the district court was correct in deciding *both* issues as it did, affirmance of its holding on *either* ground would be sufficient to sustain the summary judgment entered in favor of defendants.

We find no error in the court's conclusion that plaintiff is estopped by reason of the probate proceedings from raising claims of negligence against defendants. Notice and an opportunity to raise objections were provided. Plaintiff had retained counsel to represent her and could have participated and litigated her claims in the Surrogate's Court. Her failure to do so is no bar to the application of the doctrine of estoppel by judgment. Defendants therefore were entitled to judgment as a matter of law.

In concluding that no genuine issue of material fact existed, the court had before it depositions, answers to interrogatories, and affidavits and supporting documents. This is not a case in which summary judgment was rendered on the basis of a premature conclusion that material factual issues were not present. Plaintiff cannot rest upon her denials to prevent summary judgment from being entered against her.

Affirmed.

/s/ _____
J. Joseph Smith

/s/ _____
William H. Timbers
Circuit Judges

/s/ _____
Lloyd F. MacMahon
United States Circuit Judge
Sitting by Designation